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IN THE

Supreme Court of the United States

October Term, 1961

No. 527

IN THE MATTER OF THE APPLICATION

of

ROBERT V. RAFTER,

Appellant,

For an Order Pursuant to Article 78 of the Civil Practice Act,

against

D. HAYS, A. KELLEGREW,

Respondents,

AND

The HON. ARON STEUER, Justice of the Supreme Court,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

LODER APPEAL PRESS, INC., 41 VESEY STREET WOrth 2-0689

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The appellant, pursuant to the United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order rendered in this proceeding.

Opinions Below

No opinion was rendered by the Court of Appeals of the State of New York.

No opinion was rendered by the Appellate Division of the Supreme Court of the State of New York.

Jurisdiction

The appeal herein is from the final order of the Court of Appeals of the State of New York.

This is a proceeding, pursuant to the provisions of Article 78 of the Civil Practice Act, to compel the signing of an order and to enjoin the obstruction of justice.

The final order of the Court of Appeals of the State of New York appealed from was made and entered on February 23, 1961. Notice of Appeal was filed in the Court of Appeals of the State of New York on May 24, 1961.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final order complained of by virtue of the provisions of Title 28, Sections 1257(2) and 2101(c) of the United States Code.

The statute of the State of New York involved is Section 588 of the Civil Practice Act, cited as added by the laws of New York 1942, Chapter 297. The particular subdivision of that section involved is subdivision 1, which provides in pertinent part as follows:

> Section 588. Appeal as of right.
>
> "Appeal to the Court of Appeals as of right lies only
>
> 1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, and provided further that
>
> (a) there be directly involved the construction of the constitution of the state or of the United States;"

Question Presented

Article 78 of the Civil Practice Act governs hearings and procedure relating to a proceeding against a justice of the Supreme Court of the State of New York.

Section 588 of the Civil Practice Act governs appeals to the Court of Appeals of the State of New York. Appellant's appeal was dismissed on motion, and appellant was ordered to pay costs.

The question presented is:

Whether appellant has been deprived of property without due process of law.

Statement of the Case

The appellant appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered in this proceeding in the office of the Clerk of the Court of Appeals the 23rd day of February, 1961, dismissing appellant's appeal from the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, entered the 29th day of November, 1960.

The Facts

The proceeding herein was commenced on the 22nd day of September, 1960, by the filing of a Petition in the Appellate Division in and for the First Judicial Department by the appellant (1) to compel respondent, the Honorable Aron Steuer, Justice of the Supreme Court of the State of New York, to sign an order, and (2) to enjoin the obstruction of justice by Hays and Kellegrew, respondents in the lower court, the Appellate Division (R. 22).

The Petition was duly served upon all respondents, returnable before the Appellate Division on the 4th day of October, 1960 (R. 18, 58 ,64, 70).

Neither Hays nor Kellegrew answered or appeared in the proceeding (R. 5).

The respondent, the Honorable Aron Steuer, appeared by the Honorable Louis K. Lefkowitz, Attorney General of the State of New York, and moved to dismiss the petition by notice of motion served by mail the 10th day of October, 1960, and returnable the 4th day of October, 1960 (R. 78, 81).

Appellant's Petition was unanimously dismissed by order of the Appellate Division entered November 29, 1960 (R. 7).

Appellant appealed to the Court of Appeals (R. 85) and noticed the appeal for argument for February 27, 1961, in accordance with the rules of preference, Civil Practice Act, Section 138(7), cited as added by the Laws of 1940, Chapter 247.

Respondent, the Honorable Aron Steuer, by motion returnable before the Court of Appeals February 20, 1961, moved to dismiss the appeal.

The Court of Appeals by order entered the 23rd day of February, 1961, dismissed the appeal.

From this order, the appellant now appeals to The Supreme Court of the United States.

The Constitutional Question Presented

I

The question presented is a constitutional one: the validity of Section 588, subdivision 1, of the Civil Practice Act *in its application to the proceeding herein.*

This federal question was raised by appellant and respondent in their respective affidavits before the Court of Appeals, appellant taking the position that Section 588 (1) has no application to the proceeding herein, *since this proceeding originated in the Appellate Division;* and respondent contending that Section 588 (1) has application and, absent a constitutional question, no appeal will lie.

The Court of Appeals upheld the statute and dismissed the appeal for want of a constitutional question.

Appellant contends that an appeal lies as of right, and the right to appeal is limited only where the court of first instance and the Appellate Division unanimously concur in the disposition of the action or proceeding.

In the case before us, however, there has been no unanimous concurrence by both the Appellate Division and the court of first instance, nor indeed could there be such concurrence since *the proceeding originated in the Appellate Division,* and hence the Appellate Division is the court of first instance.

Thus, in *McNamara* v. *Goldan,* 194 N. Y. 315 (1909), the question arose as to whether an appeal was properly before the Court of Appeals, though no leave to appeal had been granted. In allowing the appeal, the court held that the right to appeal is limited only where the court of first instance and the Appellate Division unanimously concur.

So also, Carmody-Wait, Volume 9, page 284, Section 39, states the law as follows:

> "The spirit and intention of the law is that where *both* the court of first instance and the Appellate Division unanimously concur in the disposition of an action or proceeding, an appeal shall

> not be taken to the Court of Appeals as a matter of right, *but that it is only in such a case that the right to appeal is limited.*"

There being no express provision in Article 78 for an appeal to the Court of Appeals, the general provisions of the Civil Practice Act apply.

> Civil Practice Act, Section 1306;
> Carmody-Wait, Vol. 22, page 558.

Additionally, Section 138 (7) of the Civil Practice Act does contemplate an Article 78 appeal to the Court of Appeals as follows:

> "Section 138. Preferences of certain civil causes in appellate courts.
>
> • • • • •
>
> 7. Where a proceeding has been instituted pursuant to article seventy-eight of this act against a justice of the supreme court, the cause in the discretion of the court, *or where an appeal therein is taken to the court of appeals,* in the discretion of that court, may be preferred over other causes."

This is a proceeding pursuant to Article 78—a *special proceeding* against a justice of the supreme court. This would seem to give rise to an *a fortiori* argument in favor of a *first appeal* as of right.

The petition asks merely that the justice *sign* the order (R. 29). This is a ministerial and routine duty (R. 49). The petition does not ask that the justice decide the motion. The motion was decided a long time ago (R. 25, 35).

In brief, petitioner's request is almost *de minimis.* Why, then, the opposition. Due process would seem to permit an appeal as of right.

II

A further constitutional question stems from the second part of the petition relating to the obstruction of justice (R. 27, 29). The precise nature of these acts is set forth in petitioner's affidavit in support of the petition (R. 50, 51), and further demonstrated by documentary proof set forth in petitioner's brief before the court of appeals, filed herein (Brief, p. 8).

The notice of appeal to The Supreme Court of the United States was filed May 24, 1961. Hays has *since* testified that *The Manufacturers Trust Company* of New York City referred the subject defendant, Mary T. Wilson, to Hays and that it was in this manner that Hays and Kellegrew came to represent her (Index No. 3221—1961, Supreme Court Westchester County). *The matter of this referral was posed by appellant upon direct examination of Hays on March 4, 1952. The Honorable Cornelius D. McNamara refused to permit inquiry* (R. 52; Brief p. 31, last six lines).

The question then arises as to why would the Manufacturers Trust Company want Hays to represent the defendant.

Hays is a member of the OSS, now the CIA, functioning under the Department of State and the National Security Agency (R. 53).

Appellant, during the pendency of the subject lawsuit, was engaged in negotiations for the sale or lease of tankers to the National Iranian Oil Company.

The Manufacturers Trust Company is a member of the Federal Reserve System, if not a national banking association.

Examination of the bank's board of directors indicates involvement with shipping and oil interests. For instance Admiral H. Flanigan, U. S. N., brother of the board chairman, is president, director or chairman of several corporations *engaged in chartering ships to oil companies* (Poor's Register, 1955).

In 1953 Appellant brought an anti-trust suit against certain named defendants *and others* (R. 52, Brief pp. 12, 39). After examination before trial of two witnesses and upon the scheduled date for examination of three others, appellant was removed from the field of action by governmental authority (Brief p. 12).

Thereafter, the Attorney General of the United States granted anti-trust immunity to the oil companies, and they and the government negotiated a settlement of the Iranian oil dispute, the oil companies obtaining a forty percent interest. It should also be stated that the Attorney General's law firm represents shipping interests, including the Admiral, U. S. N., aforementioned.

Appellant's purpose in negotiating with the National Iranian Oil Company was to demonstrate private enterprise as it exists in the United States by putting into effect a plan of his for the operation of ships in a tax exempt manner (I. R. C. Section 231 (d), 1939 Code, now Section 883, 1954 Code); a plan submitted by appellant to W. R. Grace & Co. in early 1946, the use of said plan forming the basis of the second cause of action in appellant's anti-trust suit, aforementioned, again directed at named defendants *and others.*

Possibly a further reason for obstructing appellant in his pursuit of life, liberty and happiness is the dearth of court decisions involving the shipping industry and the popularity among United States investors of foreign cor-

porate ownership of vessels which are chartered out rather than directly operated, including the entry of institutional investors and, indeed, the Maritime Adiministrator, into the foreign shipping field (Tax Law Review, Vol. 13, pp. 140, 148, 151 1958).

Perhaps the obstruction of justice outlined herein is a demonstration of political and corporate power; it also runs counter to our purpose to *establish justice* as announced in the preamble to The Constitution of the United States.

Conclusion

For all of the foregoing reasons, Section 588, subdivision 1, of the Civil Practice Act would appear to be invalid for failure to afford due process within the meaning of Article the Fourteenth of the Constitution of the United States.

It is respectfully submitted that the Court may find this case an appropriate one for reversal without further argument.

The order of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for Appellant, pro se,
Office & P. O. Address,
150 Broadway,
New York, New York.

State of New York
County of New York—ss.:

ROBERT V. RAFTER, being duly sworn deposes and says, that he is the attorney for the Appellant herein. That on the 20th day of July, 1961, he served the within jurisdictional statement upon Louis J. Lefkowitz, Attorney General of the State of New York by depositing a true copy of same securely enclosed in a post-paid wrapper in the United States Post Office located at Church and Vesey Streets, Borough of Manhattan, New York, directed to said Louis J. Lefkowitz, Esq., Attorney General of the State of New York at 80 Centre St., N. Y. 13, N. Y. that being the address within the state designated by him for that purpose upon the preceding papers in this proceeding, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of twenty-one years.

ROBERT V. RAFTER

Sworn to before me this
20th day of July, 1961.

CARL P. RAGAZZO
Notary Public,
State of New York
Qualified in Queens County
No. 41-8482025
Cert. filed Queens Co. Clk's & Reg. Off.
Commission Expires March 30, 1962

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Order of the Court of Appeals of the State of New York, Appealed From

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of February A. D. 1961.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

1 Mo. No. 142

In the Matter of the Application

of

ROBERT V. RAFTER,

Appellant,

For an Order &c.,

vs.

D. HAYS, and A. KELLEGREW,

Defendants,

AND

the HON. AARON STEUER, Justice of the Supreme Court,

Respondent.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the

appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is directly involved (§588, subd. 1, CPA).

A copy

GEARON KIMBALL
Deputy Clerk

Article 78 of the Civil Practice Act, Section 1306.

Section 1306. Applicability of provisions governing actions. Except as otherwise expressly or by plain implication prescribed by statute, the provisions of statute and rule applicable to practice or procedure in an action apply to the proceeding under this article so far as such provisions can be applied to its substance and subject matter without regard to its form. Cited as added by the Laws of New York, 1937, chapter 526.

Internal Revenue Code, 1939, Section 231(d)

Section 231. Tax on foreign corporations.

(d) Ships Under Foreign Flag.—The income of a foreign corporation, which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States, shall not be included in gross income and shall be exempt from taxation under this chapter.

Internal Revenue Code, 1954, Section 883(1)

Sec. 883. Exclusions from gross income.

The following items shall not be included in gross income of a foreign corporation, and shall be exempt from taxation under this subtitle:

(1) Ships under foreign flag.—Earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States.

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Supreme Court of the United States

No. 387—October Term, 1961

ROBERT V. RAFTER,

Appellant,

against

THE HON. ABON STEUER, Justice of the Supreme Court,

Appellee.

On Appeal from the Court of Appeals of the State of New York.

MOTION TO DISMISS FOR WANT OF JURISDICTION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee
The Capitol
Albany 1, New York

PAYTON BLAIR
Solicitor General

JEAN M. COON
Assistant Attorney General
of Counsel

[illegible]
ALBANY, N. Y.

Supreme Court of the United States

No. 527—October Term, 1961

ROBERT V. RAFTER,

Appellant,

against

THE HON. ARON STEUER, Justice of the Supreme Court,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS FOR WANT OF JURISDICTION

Appellee in the above entitled matter moves to dismiss the appeal herein on the ground that the Court lacks jurisdiction to hear the appeal in that the appellant has not taken proper steps to secure from the highest court of New York State a decision on the merits of the cause; and on the further ground that the appeal presents no substantial federal question; and further that the appeal was not docketed in this Court within the time therefor.

Statement

This proceeding was originally commenced, pursuant to the provisions of New York Civil Practice Act, Article 78, to compel the appellee herein to sign an order and to "enjoin the obstruction of justice" by certain other per-

sons named by respondents. The jurisdictional statement recites (p. 4) that these other individuals neither appeared nor answered. The proceeding was within the original jurisdiction of the Appellate Division of the New York Supreme Court, First Department, and was properly begun in that Court.

The appellee moved to dismiss the petition, and the motion was unanimously granted by order entered November 29, 1960. 12 A. D. 2d 484. The appellant herein thereupon appealed to the New York Court of Appeals. Appellee moved to dismiss that appeal on the grounds that it was improperly taken as of right since no substantial constitutional question was directly involved. This motion was granted by order entered February 23, 1961. 9 N. Y. 2d 759.

Instead of *seeking leave to appeal* to the Court of Appeals, the established remedy where an appeal as of right does not lie, appellant appealed to this Court, alleging a deprivation of property without due process of law, in violation of the provisions of the United States Constitution. The Notice of Appeal to this Court was filed on or about May 24, 1961.

POINT I

The case is not properly within the jurisdiction of this Court since no final decision on the merits has been obtained from the highest court in New York, and further the case presents no substantial constitutional question.

We submit that this Court lacks jurisdiction of this appeal because the appellant has not taken the proper steps to obtain a judgment of the highest state court finally

determining the case *on the merits*, and on the further ground that the case fails to present a substantial federal constitutional question.

Appeals to the New York Court of Appeals are governed by Civil Practice Act, §§ 588 and 589. Section 588 provides, in part, that an appeal *as of right* may be taken to the Court of Appeals from a final unanimous judgment or order of the Appellate Division only if there is directly involved the construction of the state or federal constitution, or from a judgment of a court of original jurisdiction where the *only* question involved on appeal is the validity of a state or federal statute under the state or federal constitution.

Appeals which do not lie as of right, pursuant to § 588, come within the provision of § 589. That section provides that in all other cases, appeal to the Court of Appeals may be by permission of either the Appellate Division or of the Court of Appeals.

In the instant case the appeal as of right was dismissed on the ground that no substantial constitutional question was directly involved. Civil Practice Act, § 592, provides that in the event of dismissal of an appeal as of right the appellant may still proceed to move for permission to appeal pursuant to § 589. This the appellant herein failed to do. Therefore, the decision of the Court of Appeals dismissing his appeal as of right did not finally determine the case in the highest state court upon the merits but left available an appeal by permission, a remedy which the appellant failed to pursue.

Appellant herein contends that a proper construction of the law requires the right of direct appeal to the Court of Appeals from *all* proceedings originating in the Appellate Division. This has never been the law of New York.

In *Matter of Mathot* (222 N. Y. 8 [1917]) the Court considered a motion to dismiss an appeal taken as of right in a disbarment proceeding originating in the Appellate Division, First Department. In granting the motion to dismiss the appeal, the Court held that only an appeal by permission would lie, the case not falling within one of the statutory provisions authorizing an appeal as of right. (See, also, *Matter of Lehman*, 264 N. Y. 462 [1934]; and *Matter of Bakerman*, 295 N. Y. 811 [1946].)

Proceedings for admission of attorneys to practice before the courts of New York originate in the Appellate Division. In *Matter of Peters* (257 N. Y. 552 [1931]), an appeal as of right, from an order of the Appellate Division rejecting an application for certification for admission to the bar, was dismissed. (See, also, *Matter of Morrell*, 297 N. Y. 718 [1947].)

An authoritative work on the jurisdiction of the Court of Appeals (Cohen & Karger, *Powers of the New York Court of Appeals*) has stated the rule as follows (§ 51, p. 231):

> "Since appeal of right from final determinations of the Appellate Division is limited to cases where there has been a dissent, reversal or modification or where a constitutional question is directly involved, it is clear that *there can generally be no appeal of right from a determination originating in the Appellate Division* unless there is a dissent, or a constitutional question directly involved; for obviously there can ordinarily be neither reversal nor modification in such a case." (Italics ours.)

Appellant further contends that even if a correct construction of the statute results in a denial of the right of appeal to the Court of Appeals, such a construction is offensive to due process.

The right of the States to determine their own court procedures, including the basis for appeal, has long been recognized by this Court.

In *John* v. *Paullin* (231 U. S. 583 [1913]), in construing appeal rights under an Illinios statute, this Court held (p. 585):

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reversed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly, no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the State law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Later in the opinion the Court further emphasized this holding (p. 587):

> "As particularly apposite, we quote the following from the opinion in *Newman* v. *Gates, supra* [204 U. S. 89 (1907)], a case in which this court declined to review a like judgment of dismissal by a state court:
>
> 'Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon

> the due faith and credit clause of the constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.' "

When the above decision is applied to the instant case, it is manifest that the appellant has failed to follow the statutory procedures for appeal to the highest court of New York, and that no final judgment or decree, deciding a federal question *on the merits*, has ever been rendered by the New York Court of Appeals. It is as if no appeal had been prosecuted from the order of the Appellate Division. Hence this Court has no jurisdiction to hear the appeal. (See, also, *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 214 U. S. 191 [1909]; *Central Union Co.* v. *Edwardsville*, 269 U. S. 190 [1925]; and *Parker* v. *Illinois*, 333 U. S. 571 [1948].)

The issues presented by this appeal as to state appellate practice having been previously determined by this Court against the appellant, not only is jurisdiction wanting but there is also absent any substantial federal question.

POINT II

The case was not docketed within the time set therefor by the rules of this Court.

The Notice of Appeal herein was filed on or about May 24, 1961. The case was docketed in this Court on October 31, 1961.

Rule 13 of the Rules of this Court provides that the appellant must docket the case not more than sixty days after the filing of the Notice of Appeal. The time for so filing not having been enlarged by order of a Justice of this Court or by any other court, the appeal has not been docketed in time.

CONCLUSION

The appeal herein should be dismissed for lack of jurisdiction to hear the appeal, on the ground that no substantial federal question is presented, and further on the ground that the appeal was not filed in time.

Dated November 3, 1961.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellee
The Capitol
Albany 1, New York

PAXTON BLAIR
Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel